SUPREME COURT OF THE UNITED STATES.

No. 359.

THE UNITED STATES, EX REL. J. EDGAR THOMSON, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF HENRY COUNTY ET AL., IOWA.

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1 Proceedings before the circuit court of the United States in and for the district of Iowa, at a term thereof begun and holden on the third Tuesday of October, A. D. 1865, at Des Moines, Iowa.

Be it remembered that on the 20th day of January, A. D. 1865, a petition was filed in the office of the clerk of this court, of the tenor following, that is to say:

2 *Petition for mandamus.*

Circuit court of the United States for the district of Iowa.

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thomson,
vs.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and the county treasurer of Henry co., Iowa.

And now comes the United States of America, at the relation of J. Edgar Thomson, and, complaining, says said relator is a citizen of the State of Pennsylvania, residing at Phil'a, and that Henry county is a municipal corporation existing under and by virtue of the laws of the State of Iowa, and is a citizen of the State of Iowa within the meaning and intent of the laws of the United States.

Relator states further that the 1st January, 1857, said municipal corporation, in pursuance of law, and by virtue of a vote of the people of said county, cast at an election held therein on the first Monday of January, 1855, executed by the hands of his county judge, (he being then financial agent of said county, and upon whom such duties then devolved,) and under the seal of said county, her certain one hundred corporate "eight per cent. railroad subscription bonds," for the sum of one thousand dollars each, all dated 1st January, A. D. 1857, and payable twenty years after date, with 8 per
3 cent. interest, payable annually, according to the tenor and effect of coupons of eighty dollars each, thereto attached; and said bonds being made payable to the Keokuk, Mount Pleasant, and Muscatine Railroad Company, or bearer, and were thus executed and delivered to said railroad company in payment of the subscription made by said county to said railroad company, and for which said county has or is entitled to receive a corresponding amount of stock in said road, and which road runs (as projected) through said county.

Relator further states that the question of the subscription of stock by said county to said railroad company, and the proposition adopted by the vote of its people as aforesaid, contain a provision that an annual tax should thereafter be levied by the county judge of said county, to pay the interest and principal of said bonds as same became due, and that said tax should be continued from year to year until the whole should be paid.

Relator states that afterwards the said bonds were delivered to

said railroad company and were put upon the market for sale, and that only after the supreme court of Iowa had decided that counties in said State had the constitutional right to take stock in such railroads, and to issue bonds therefor, did he become the holder and owner of a large number of said bonds of Henry county, Iowa, having bought them for value received, in the ordinary course of
4 trade, and before maturity of the bonds or coupons thereto attached.

Relator states since then there has been a change made by the legislature of said State, whereby the management of revenue, taxes, and fiscal affairs of said county has been taken from the county judge and vested in a board of supervisors of said county, to be elected by the people; and that now the board of supervisors of Henry county, Iowa, are the legal representatives of said county, that it is their duty to levy and collect, or caused to be collected, all taxes which the people of said county should pay, save, perhaps, the city taxes of incorporated towns or cities within said county.

Relator states that said board of supervisors have failed and refused for several years last past to levy or collect, or cause to be collected, any tax or taxes to pay the interest coupons maturing upon said bonds; and that he afterwards brought two suits in this court upon the coupons held and owned by him, and maturing at different times, to wit, one upon forty-eight coupons of $80 each, and one upon 79 coupons of $80 each. And on the 21 day of October, 1864, that he obtained judgments against said Henry county, to wit, on one upon the 48 coupons, for the sum of four thousand four hundred and seventy-one $\frac{92}{100}$ dollars; and one upon 79 coupons for the sum of seven thousand six hundred fifty-three and $\frac{23}{100}$ dollars, and eight per cent. interest and costs of suit, amounting to $, which judgment still remains of record in this court, in full force, and un-
5 appealed and unreversed, to which reference is hereby given.

Relator states that on the 25th day of November, 1864, he, by the sheriff of Henry county, Iowa, made a demand upon the board of supervisors of Henry county, Iowa, (by reading a written notice to Harpin Riggs, president of said board, and by giving him a copy of the same,) that they at their next meeting thereafter should levy a tax upon the valuation of property in said county, and collect, or cause same to be collected, sufficient at least to pay said judgments, interest and costs; a copy of which notice and demand is hereto attached and filed and made a part. That on the 4th January, 1865, said board of supervisors held a meeting, and having duly considered the matter of said demand and notice, resolved, "it would be unjust to the tax-payers of Henry county, as long as there are so many conflicting opinions in our courts as regards the legality of railroad bonds," to levy any more taxes to pay said bonds, and refused, and still refuse, to levy or collect, or cause to be collected, any tax named in said notice and demand.

Relator states said county has no funds or property he can reach on execution sufficient to pay said judgments or any part thereof,

and that he is remediless and impotent to collect his judgments, or either of them, or any part thereof, except by the exercise of the power of this court to award him a writ of mandamus, to compel the levy and collection of the taxes for the purposes aforesaid.

6 Relator states the county treasurer is the custodian of the funds and revenues of said county, and he is also the officer who by law is required to collect all taxes levied or assessed by the board of supervisors of said county.

Relator states said board of supervisors of said county are a numerous body, who have chosen, as the law directs, one of their number as president; and he states, further, that the clerk of the district court, Henry county, is ex officio clerk of the board of supervisors of said county, and he asks that any writ of mandamus hereinafter to be issued may be directed to be served upon the president or clerk of said board, or both of them, and such service to be held sufficient in law.

And thereupon relator prays for a writ of mandamus to issue from this court, under the seal thereof, directed to the board of supervisors of Henry county, Iowa, and to the county treasurer of Henry county, Iowa, commanding and requiring said board of supervisors, and their successors in office, to levy and collect, or order and cause to be collected, in addition to the usual taxes, a tax which will be sufficient to pay off said judgments, interest and costs, and the costs of this proceeding, and commanding said county treasurer of Henry county, Iowa, and his successor in office, to receive and collect said railroad taxes, levied or to be levied, for the purpose aforesaid, in the same manner and by the same process and means as other taxes are

7 or may be by him collected and enforced, and that he keep said railroad taxes separate and apart from other taxes and revenue of said county, and that he pay over to relator, or his attorney, the amount of said judgments, interest and costs, and costs of this proceeding.

All of which relator claims of right; but for which he will ever pray, &c.

United States of America, *ex rel.* J. Edgar Thomson, relator—
H. SCOTT HOWELL, *Att'y for Relator.*

STATE OF IOWA, *Lee county, ss:*

I, H. Scott Howell, being first duly sworn, state, I am agent and attorney for J. Edgar Thomson, relator in the above-entitled cause, that I am personally acquainted with the chief facts stated in the foregoing petition, and that the allegations therein stated are true, as I verily believe.

H. SCOTT HOWELL.

Sworn to and subscribed before me, a notary public in and for said county, on this 18th January, 1865.

As witness my hand and seal notarial, at Keokuk, Iowa.

[SEAL.] E. P. McCARTY,
Notary Public, Lee County, Iowa.

8 With which petition was filed a notice and demand, of which the following is a copy, viz:

9 To the board of supervisors of Henry county, Iowa:

Whereas J. Edgar Thomson, at the last October term of the United States circuit court for the district of Iowa, recovered two judgments against the county of Henry, Iowa—one for $7,653 23, and one for $4,471 92, and costs, each being obtained upon coupons, cut from certain eight per cent. railroad subscription bonds, issued by said county to the Keokuk, Mt. Pleasant, and Muscatine Railroad Co., in pursuance of a vote of her people, had on the first Monday of August, 1855, which coupons said county failed to pay:

Now, this is to notify and demand of you, that you shall, at the next session of your board, after this is served upon your president, or at the same session, if served in term time, that you levy and cause to be collected the taxes as provided by said action of the people of said county, and required of you thereby and by law, for each year past, since then, upon the valuation of each year, in order to pay said judgments, interest and costs, or in default thereof, an application will be made to the courts for a mandamus to require said acts at your hands.

J. EDGAR THOMSON, *Pl'ff*,
Nov. 22, 1864. By H. SCOTT HOWELL, *his Att'y*.

Upon which notice and demand the following return was made, to wit:

10 Rece'd this notice November the 25th, 1864, at 12 o'clock m., and I served same immediately on Harpin Riggs, president of the board of supervisors of Henry county, Iowa, by reading same to him, and by delivering to him a true copy hereof, in the city of Mt. Pleasant, Henry county, Iowa.

W. T. SPEARMAN,
Sheriff of Henry County, Iowa.

Sh'ff fees:

Service	50
Copy	30
Mileage	10
Postage	5
	95

11 And the following precipe was filed, viz:

12 Circuit court of the U. S., dist. of Iowa.

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thomson,
v.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and the county treasurer of Henry county, Iowa, defendants.

Issue a summons in the above-entitled case, returnable according to law, requiring them to answer a petition for mandamus to compel said defendants to levy and collect a tax to pay two judgments had by relator against said Henry county in this court on railroad coupons of said county.

J. HENRY THOMSON, *Relator*,
By H. SCOTT HOWELL, *his Att'y.*

13 And a writ of summons was issued, in the words and figures following, on which was made a return as hereinafter written, to wit:

14 UNITED STATES OF AMERICA, *District of Iowa:*

To the marshal of the district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon the board of supervisors of Henry county, Iowa, and the county treasurer of Henry county, Iowa, to appear before the circuit court of the United States in and for the district of Iowa, at a term to be begun and holden at Des Moines on the 2d Tuesday, it being the ninth day of May next, to answer unto the petition of the United States, *ex rel.* of J. Edgar Thomson, for a writ of mandamus to compel them to levy and collect a tax to pay the judgments had by relator against said Henry county in this court on railroad coupons of said county. The relator, J. Edgar Thompson, is a citizen of the State of Pennsylvania, residing at Philadelphia; hereof fail not.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Des Moines, this 31st day of January, A. D. 1865, and of the independence of the United States the 89th.

[SEAL.] W. G. WOODWARD, *Clerk.*

On which was made the following return, to wit:

Rec. this writ Feb. 6, 1865.

Served this writ upon Henry county, Iowa, by reading this
15 writ to Harpin Riggs, president of *of* the board of supervisors of Henry county, Iowa, on the 6th day of March, 1865, in the town of Mount Pleasant, Henry co., Iowa. I also left with him a true copy of this writ at the same time and place. I also read this writ to C. B. Arnold, treasurer and collector of Henry county, Iowa, on

the 6th day of March, 1865, in Mount Pleasant, Iowa. I also left with him a true copy of this writ at the same time and place. No copy of petition demanded by either of the above-named persons.

H. M. HOXIE, *U. S. M.*,
By H. FULTON, *Dept.*

Marshal's fees:

Service on two	$4 00
Copies, two	50
Miles, 150	9 00
	13 50

Rec. the above fees of H. Scott Howell, pl'ff att'y.
H. FULTON, *Dept. U. S. M.*

16 And on the 18th day of October, 1865, was filed an answer, in the words following, to wit:

17 *Answer.*

In the circuit court of the U. S., district of Iowa.

THE UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thomson,
vs.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and the county treasurer of Henry county, Iowa.

And now comes the said respondents, the board of supervisors of Henry county, Iowa, and the county treasurer of Henry county, Iowa, and for answer to the petition of the relator they say—

1. They admit that the county judge of Henry county, Iowa, undertook to issue in the name of said county certain bonds and coupons as alleged, but they deny that such bonds and coupons were issued in pursuance of law. or were or are of any validity.

2. These respondents have no personal knowledge as to whether the relator purchased the coupons described as alleged, and they therefore deny the same and demand proof.

3. Respondents say that although the relator may have obtained judgments as set forth in his petition, yet that he ought not to have the relief sought, and no peremptory writ of mandamus should be issued as prayed for to compel these respondents to levy and
18 collect a tax for the payment of the judgments aforesaid, for that these respondents show to the court that before the commencement of this suit, to wit, on the 5th day of January, 1865, certain citizens and tax-payers of Henry county, Iowa, to wit, J. B. Hart, Peter Housel, Hugh Campbell, Amos Montgomery, Daniel Turney, and R. M. Rickel, presented their bill in chancery against the said Henry county, Iowa, and these respondents and others, including the said relator, J. Edgar Thompson, to the Hon. R. P. Lowe,

judge of the supreme court of the State of Iowa, who was authorized to grant preliminary injunctions by the laws of said State, which bill in chancery, among other things, alleged that the said bonds and coupons were null and void from the beginning; that they had been held so to be void repeatedly by the judicial tribunals of the State of Iowa, and especially by the supreme court of said State of Iowa, the court of last resort in the said State; and the said complainants in said bill of chancery, among other things, prayed for a writ of injunction against these respondents and others, enjoining and restraining them, and each and every of them forever, from levying or collecting any tax for the payment of any bonds or coupons issued or attempted to be issued by the county of Henry to aid in the construction of railroads, and thereby referring, among others, to the coupons described in petition.

Respondents further say that on the said 5th day of January, 1865, the said R. P. Lowe, judge of the supreme court of the State of Iowa, having heard and examined said petition, did allow and grant the writ of injunction as therein prayed for.

And afterwards, to wit, on the 20th day of January, 1865, the said petition in chancery was regularly filed in the district court of Henry county, Iowa, and the same is still pending therein.

Respondents further state that, as required by the order of the said R. P. Lowe, judge, &c., the clerk of the said district court of Henry county, Iowa, did on the 20th day of January, 1865, issue a writ of injunction directed to these respondents and others as prayed for in said petition in chancery, whereby these respondents were strictly enjoined and commanded to desist altogether from levying or causing to be levied any tax for the purpose of paying either principal or interest of the coupons mentioned in the plaintiff's petition, as well as others.

And respondents say that the said writ of injunction was duly and regularly served upon these respondents upon the 21st day of January, 1865, which was before any writ of summons was issued in this cause.

And respondents say that the proceedings in said injunction suit were regular and legal throughout; that these respondents were not parties to any suits which the relator may have brought against Henry county, Iowa, to recover judgment upon the coupons described in the petition; that the respondents, as citizens of the said Henry county, Iowa, and as officers of said county, are and were within the jurisdiction of said court, and bound to obey its injunctions and orders; that it is not in their power now to levy or collect, or cause to be levied or collected, any tax for the payment of the said judgments described in relator's petition; that should they attempt to do so, they would subject themselves to imprisonment for contempt.

They further say that they were served with said injunction, and with notice of the said injunction suit, and become bound by the

proceedings therein before any summons was served in this proceeding, and before respondents had any notice of this proceeding.

Wherefore respondents say that the relator ought not to have a peremptory writ of mandamus as prayed, and they pray to be dismissed with their costs, &c.

RANKIN & McCREARY,
Attorneys for Respondents.

21 And on the 19th day of the same October there was filed a demurrer, of which the following is a copy, to wit:

22 *Demurrer of relator.*

Circuit court of United States for the district of Iowa.

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thomson,
v.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and the county treasurer of Henry county, Iowa, respondents. } Mandamus.

And now comes the relator, J. Edgar Thomson, and demurs to the third subdivision of the answer of respondents; and, for cause of demurrer, says:

1st. The facts stated therein are not sufficient in law to constitute a defence against the relief sought by relator, for that it appears—

1st. The judgments had in this court, by the relator, upon coupons sought to be enjoined, were had long before said injunction proceedings were instituted in the court of Iowa.

2d. For that it also appears that the petition of relator was filed in this court on same day the petition for the injunction against respondents was filed in the district court of Henry county, Iowa, both being filed 20 January, 1865.

It is not alleged or shown by respondents that relator has any other remedy to collect his judgments, save as alleged in his petition herein, by mandamus.

23 Because the jurisdiction of this court first attaches by its former judgments over the subject-matter, and necessarily over the persons of respondents; and no State court can oust this court of its jurisdiction, or stay or enjoin its process for the enforcement of its judgments.

Whereupon relator prays the judgment of this court if he be not entitled to a peremptory writ of mandamus.

J. EDGAR THOMSON, *Relator*,
By H. SCOTT HOWELL, *his Attorney*.

24 And on the 21st day of October aforesaid, A. D. 1865, the following entry was ordered to be made of record, viz:

25 *Entry of judgment.*

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thomson,
vs.
THE BOARD OF SUPERVISORS OF HENRY COUNTY Iowa, and the county treasurer of Henry county, Iowa, respondents.

This day came J. Edgar Thomson, relator, by H. Scott Howell, his att'y; and there came also the aforenamed respondents, by Rankin and McCray, their attorneys, and this cause came on for hearing upon the demurrer of relator to the third subdivision of the answer or return of the said respondents; and the court being advised in the premises, upon consideration thereof, do overrule the said demurrer, and adjudge costs of suit against him, and awards execution therefor, and the relator standing on his demurrer, at the same time, excepts to the said ruling, and gives notice of appeal therefrom.

26 And on the same 21st day of October, came the relator and presented to the court the following bill of exceptions.

27 *Bill of exceptions.*

In the circuit court of the United States for the district of Iowa, October term, 1865.

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thompson,
vs.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and county treasurer of Henry county, Iowa, respondents.

Be it remembered, that this cause came on for hearing on the 21st day of October, 1865, upon the demurrer of the relator to the third subdivision of the answer or return of the respondents filed herein, which subdivision of the respondents' answer, and the demurrer of the relator thereto, are severally in the words and figures following, to wit:

3d subdivision of answer:

Respondents say that although the relator may have obtained judgment as set forth in this petition, yet, that he ought not to
28 have the relief sought, and no peremptory writ of mandamus should be issued, as prayed for, to compel these respondents to levy and collect a tax for the payment of the judgments aforesaid.

For that these respondents show to the court that before the commencement of this suit, to wit, on the 5th day of January, 1865, certain citizens and tax-payers of Henry county, Iowa, to wit, J. B. Hart, Peter Housel, Hugh Campbell, Amos Montgomery, Daniel Turney,

and R. M. Pickell, presented their bill in chancery against the said Henry county, Iowa, and these respondents and others, including the said relator, J. Edgar Thompson, to the Hon. R. P. Lowe, judge of the supreme court of the State of Iowa, who was authorized to grant preliminary injunctions by the laws of said State, which bill in chancery, among things, alleges that the said bonds and coupons were null and void from the beginning; that they had been held so to be void repeatedly by the judicial tribunals of the State of Iowa, and especially by the supreme court of said State of Iowa, the court of
29 last resort in said State.

And the said complainants, in the said bill in chancery, among other things prayed for a writ of injunction against these respondents and others, enjoining and restraining them, and each and every of them, forever, from levying or collecting any tax for the payment of any bonds or coupons issued or attempted to be issued by the county of Henry, to aid in the construction of railroads, and thereby referring, among others, to the coupons described in the petition.

Respondents further say that on the said 5th day of January, 1865, the said R. P. Lowe, judge of the supreme court of the State of Iowa, having heard and examined said petition, did allow and grant the writ of injunction as therein prayed for.

And afterwards, to wit, on the 20th day of January, 1865, the said petition in chancery was regularly filed in the district court of Henry county, Iowa, and the same is still pending therein.

Respondents further state that, as required by the order of said R. P. Lowe, judge, &c., the clerk of the said district court of Henry county, Iowa, did on the 20th day of January, 1865, issue a writ of
30 injunction directed to these respondents and others, as prayed for in said petition in chancery, whereby these respondents were strictly enjoined and commanded to desist altogether from levying or causing to be levied any tax for the purpose of paying either principal or interest of the coupons mentioned in the plaintiff's petition, as well as others.

And respondents say that the said writ of injunction was duly and regularly served upon these respondents upon the 21st day of January, 1865, which was before any writ of summons was issued in this cause, and respondents say that the proceedings in said injunction suit were regular and legal throughout; that these respondents were not parties to any suits which the relator may have brought against Henry county, Iowa, to recover judgment upon the coupons described in the petition; that the respondents, as citizens of said Henry county, Iowa, and as officers of said county, are and were within the jurisdiction of said court, and bound to obey its injunctions and orders; that it is not in their power now to levy or collect, or
31 cause to be levied or collected, any tax for the payment of the said judgments described in relator's petition, and that should they attempt to do so they would subject themselves to imprisonment for contempt.

They further say that they were served with said injunction and with notice of the said injunction suit, and became bound by the pro-

ceedings therein before any summons was issued or served in *in* this proceeding, and before respondents had any notice of this proceeding.

Wherefore respondents say that the relator ought not to have a peremptory writ of mandamus as prayed for, and they pray to be dismissed with their costs, &c.

RANKIN & McCRARY,
Attorneys for Respondents.

32 *The demurrer of the relator to the third subdivision of the respondents' answer.*

Circuit court of the United States for the district of Iowa.

UNITED STATES OF AMERICA, *ex rel.* J. Edgar Thompson, *vs.* THE BOARD OF SUPERVISORS OF HENRY COUNTY, Iowa, and the county treasurer of Henry county, Iowa, respondents.	Mandamus.

And now comes the relator, J. Edgar Thompson, and demurs to the third subdivision of the answer of the respondents, and for cause of demurrer, says :

1. The facts stated therein are not sufficient in law to constitute a defence against the relief sought by relator, for that it appears—

1st. That the judgments had in this court by the relator upon coupons sought to be enjoined were had long before said injunction proceedings were instituted in the State court of Iowa.

33 2. For that it also appears that the petition of relator was filed in this court on the same day the petition for the injunction against respondents was filed in the district court of Henry county, Iowa, both being filed 20th January, 1865.

2d. It is not alleged or shown by respondents that relator has any other remedy to collect his judgments save as alleged in his petition herein by mandamus.

3. Because the jurisdiction of this court first attaches by its former judgments over the subject-matter, and necessarily over the persons of respondents ; and the State court cannot oust this court of its jurisdiction, or stay or enjoin its process for the enforcement of its judgments.

Whereupon the relator prays the judgment of this court, if he be not entitled to a peremptory writ of mandamus.

J. EDGAR THOMPSON, *Relator*,
By H. SCOTT HOWELL, *his Att'y.*

34 And the court, on consideration of the premises, overruled said demurrer, and awarded judgment to the respondents thereon; to which ruling and judgment of the court the relator, by his counsel, H. Scott Howell, then and there excepted, and gave notice of appeal therefrom. And thereupon relator presents this his bill of

exceptions, and asks that it be allowed, signed, sealed, and made a part of the record, which is done.

Dated Oct. 21, 1865.

[SEAL.] SAMU'L F. MILLER, *Judge.*

35 UNITED STATES OF AMERICA, *District of Iowa, ss:*

I, W. G. Woodward, clerk of the circuit court of the United States in and for the district of Iowa, hereby certify that the foregoing twenty-seven pages of writing constitute and contain a full, true, and complete transcript of all the pleadings and papers of the record and bill of exceptions in the above-named cause, as fully as the same remain of record in my office, and the same is returned in obedience to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court, this 21st day of November, A. D. 1865.

[SEAL.] W. G. WOODWARD, *Clerk.*

[5-cent rev. stamp.]

Clerk's fees :

Transcript	$6 75
Certif. and seal	35
	7 10

Received the above from H. Scott Howell, esq., counsel for relator.

W. G. WOODWARD, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting :

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in said court before you, between the United States, at the relation of J. Edgar Thompson, and the Board of Supervisors of Henry county, Iowa, and the Treasurer of Henry county, Iowa, a manifest error hath happened, to the great damage of the United States, at the relation of J. Edgar Thompson, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, on the first Monday of December next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error

what of right and according to law and custom of the United
37 States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord eighteen hundred and sixty-five, and of the independence of the United States the eighty-ninth.

Witness my hand and seal of the circuit court of the United States in and for the district of Iowa, date last above written.

[SEAL.] W. G. WOODWARD,
Clerk of Circuit Court U. S. for Iowa.

38 Indorsed: Supreme Court U. S. United States, ex rel. J. Edgar Thomson, *vs.* Board Supervisors Henry Co., Iowa, and Treasurer of Henry county, Iowa. Writ of error.

Filed Nov. 15, 1865.

W. G. WOODWARD,
Clerk C. C. U. S., Iowa.

39 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Board of Supervisors of Henry county, Iowa, and the treasurer of Henry county, Iowa, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein the United States, at the relation of J. Edgar Thomson, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Sam'l F. Miller, one of the justices of the Supreme Court of the United States, on this 17th November, A. D. 1865.

SAM. F. MILLER, *Judge.*

1865, November 17. Received this day copy of the above citation, and we hereby acknowledge due and legal service of same upon the above-named respondents.

RANKIN & McCRARY,
Att'y for Respondents.

40 Indorsed: Supreme Court U. S. United States of America. *ex rel.* J. Edgar Thomson, *vs.* Board Supervisors Henry Co., Treasurer of Henry county, Iowa. Citation.
Filed Nov. 21, 1865.

W. G. WOODWARD, *Clerk.*

IN THE

Supreme Court of the United States.

No. 94.—December Term, 1867.

J. EDGAR THOMPSON, Relator, *Plaintiff in Error*,

vs.

THE BOARD OF SUPERVISORS OF HENRY COUNTY, IOWA, *Defendants in Error*.

STATEMENT.

Judgments were rendered in the United States circuit court, on the 21st October, 1864, amounting to $12,125.15, on railroad bond coupons, issued under laws and proceedings authorizing a tax to be levied to pay the same. On 20th January, 1865, petition in the United States court was filed for a mandamus to enforce laying a tax to pay said debt, and proceedings in the state court on same day to enjoin the same; the injunction having been granted was set up as a bar against further proceedings by the United States court, and held to be a bar. The injunction was granted by the state judge on the ground that the bonds were void, under the rulings of the supreme court of the state, conflicting with the rulings of the United States courts, based on the earlier decisions of the state courts.

POINTS AND AUTHORITIES.

It is contended for the plaintiff in error as follows:

I. The jurisdiction of the entire case, existed in the United States court, from service of the writ of summons to appear and answer to the action, down to the actual execution of all process which the court might consider necessary to enforce its judgment; and therefore such jurisdiction covered the time when the proceedings in the state court were begun.

Wayman vs. Southard, 10 Wheat, 1.
Bank of U. S. vs. Holsted, 10 Wh., 54.
Peck vs. Jenness, 7 How., 612.
Abelman vs. Booth, 21 How., 515.
Dodge vs. Woolsey, 18 How., 331.

II. When the circuit court, on the 21st October, 1864, rendered judgment on the coupons attached to the railroad bonds, all questions involved in that cause, as between the relator, plaintiff there, and all parties liable on account of said bonds became *res adjudicata;* and one of the questions involved in that judgment, and the main question too, was the validity of said bonds; and it being determined therein, not only put the question at rest, but such decision was necessarily accompanied by the order, that the appropriate process of execution should issue.

III. Here then was nothing left undecided between the relator and the corporation of Henry county, as to not only whether it ought, but should pay said bonds. Nothing was left behind for the state court to act upon, when, in January 1865, the parties commenced proceedings to stop the execution of the judgment of the United States court.

IV. A writ of mandamus is simply a process of enforcing the execution of the judgment rendered in this cause; and it is one which falls within the original understand-

ing of the contracting parties. Public creditors are not allowed by the laws of Iowa to sell, under ordinary process of execution, the property needed for municipal purposes. Taxation, is the only means which can be relied upon, to meet the public obligations. Therefore the award of execution in the judgment, entered on the records of the court against the county as a corporation, to be effectual, carries the writ of mandamus to oblige the county officers to raise the appropriate tax.—(Commissioners of Knox County vs. Aspinwall, 24 How., 376; Van Hoffman vs. City of Quincy, 4 Wall., 535; Supervisors vs. United States, 4 How., 435.)

V. An injunction can not be issued by a state court to arrest proceedings in a court of the United States, and the act of Congress forbidding United States courts from enjoining proceedings in state courts, is simply the recognition of a principle of law that prevents every court from invading the jurisdiction of another.

2 Rich. Eq. R., 320.
4 Edw. Ch. R., 377, Coster vs. Griswold.
3 Edw. Ch., 193, Schuyler vs. Pelissier.
Harring. Ch. R., 204, Carroll vs. Bank.
8 Calif., 26, Anthony vs. Dunlap.
8 Calif., 34, Richett vs. Johnson.
4 Cal., 31, Engels vs. Lubeck.
31 Barb., 366, 5 Sandf., 612.
Diggs vs. Wolcott, 4 Cranch, 119.
McKim vs. Voorhies, 7 Cranch, 279.
Act of 2d March, 1793, chap. 66, sec. 5.
Peck vs. Jenness, 7 How., 612, 625.

I. In support of the first point, the following cases are cited:

Wayman vs. Southard, 10 Wheat., 1, seems to be decisive of the case at bar. That involved the question, whether executions issued by United States courts were subject to be controlled by state authority?

It was contended there that Congress had no power to authorize its courts to issue executions; and next, if it had, that the 34th section of the act of 1789 made them subject to the state laws. The court say, "one of the counsel for the defendant insists that Congress has no power over executions issued on judgments, and that the authority of the states on this subject remains unaffected by the Constitution. That the government of the Union can not by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts, but that the state legislatures retain complete authority over them." The court, after disposing of this point, proceed to show that, while the act of Congress does not in terms authorize the court to issue executions, yet that such power is embraced in the 14th section of the act of 1789, its conclusion being stated thus: "the words of the 14th section are understood by the court to comprehend executions. An execution is a writ which is certainly *agreeable to the principles and usages of law.*"

The court then at length show that, while the 34th sec. of the act of 1789 requires the United States courts to follow state laws and decisions in questions of local law, arising before judgment, yet as to proceedings after judgment, it is not so; on the contrary, proceedings on execution of judgments are independent of regulation or interference by state authorities. Near the close of the opinion, (p. 19, of 6 Pet., Cond.,) the court say "that the power claimed for the state is not given by the 34th sec. of the act, has been fully stated in the preceding part of this opinion. That it has not an independent existence in the state legislatures, is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused. * Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers, in executing their judgments.

* It seems not much less extravagant to maintain that the practice of the federal courts, and the conduct of the officers, can be indirectly regulated by the state legislatures, by an act professing to regulate the proceedings of the state courts, and the conduct of the officers who execute the process of these courts. It is a general rule that what can not be done directly *from defect of power*, can not be done indirectly."

The court proceed elaborately to point out, that the act of 1789 does empower the courts of the United States, both to issue all needful process after judgment, and also to regulate and control the same independent of state authority. It was contended, that the following language in the 14th section of the act, was confined to proceedings before judgment—"that all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, *which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the principles of law."

The reasoning of the court bears so directly on the question now involved here, that the issuing the mandamus is but the continuous exercise of a previously attaching jurisdiction, that it seems to be necessarily decisive. The court say, (page 4, 6 Pet., Cond.,) "There is no reason for supposing that the general term *writs* is restrained by the words, *which may be necessary for the exercise of their respective jurisdictions, to original process, or to process anterior to judgments.* The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in *which jurisdiction is to be exercised.* It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true, that jurisdiction could technically be said to terminate with the judgment, an execu-

tion would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction."

The court further comment on the 34th section, to show, that in proceedings after judgment, the courts act on directly the opposite rule from what they do before it. "That section enacts that the laws of the several states * shall be regarded as rules of decision * *in cases where they apply.* This section has never, so far as is recollected, received a construction in this court; but it has we believe been generally considered * as furnishing a rule to guide the court in the formation of its judgment, *not one for carrying that judgment into execution.* It is a rule of decision, and the proceedings after judgment are merely ministerial."

The court next proceed to show that in the process act, from the language used, it was the intention of Congress to provide for the entire proceedings in a case, down to the enforcement of the execution; and such meaning is drawn, not only from the language of the act, but from its being placed in context with similar provisions made for the full and complete conduct of a suit in admiralty and equity, from the beginning to the end thereof; and the court say, that as the United States courts in those modes of proceeding have control and jurisdiction to the end of the cause, and, as language conveying the same powers as to common law proceedings, is found in the same law, it must have been the purpose of the act, not only to extend the jurisdiction of the federal courts throughout the whole course of the proceedings, but also to make such jurisdiction exclusive, and place it beyond all interference on the part of the state governments. The court thus speak, page 7: "To the forms of writs and executions, the law adds the words, and modes of process. These words must have been intended to comprehend something more than the forms of writs and executions. We have no

right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, *but is also applicable to every step taken in a cause.* It indicates the progressive course of the business from its commencement to its termination. * * This construction is supported by the succeeding sentence, which is in these words: And the forms and modes of proceedings, in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law. * * It would be difficult to assign a reason for the solicitude of Congress to regulate all the proceedings of the court, sitting as a court of equity, or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. If then, the words making provision for each, fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. *The forms of writs and executions and modes of process in courts of common law, and the forms and modes of proceedings in causes of equity and admiralty and maritime jurisdiction,* embrace the same subject, and both relate to the progress of a suit from its commencement to its close."

And in passing from the consideration of the process act of 1789 to the permanent act of 1792, the court say, page 9: "This act is drawn with more deliberation than the original act; and removes, so far as respects the question now under consideration, some doubt which might be entertained in relation to the correctness with which the act of 1789 has been construed. It distinguishes very clearly between the forms of writs, and all other process of the same character, and the forms and modes

of proceedings in suits, and provides for both. * They are distinct subjects. The first describes the paper which issues from the court, and is an authority to the officer to do that which it commands; *the last embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied.* It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of the proceedings in the suit."

The court then proceed to show, how the laws of Congress have given full and exclusive power to the courts of the United States, to regulate the proceedings therein, from the beginning to the conclusion, and vindicate this against the power of the states over any branch of the subject.

The case of Bank of U. S. vs. Halstead, 10 Wheat., 51, also involved the effect of the state laws on process out of United States courts. Land in Kentucky was offered for sale under execution from the United States circuit court, and as the state law would not permit it to be sold unless it brought three-fourths its appraised value, the United States Marshal followed the state law, and returned the land not sold, because it did not bring that much.

The court, (6 Pet., Cond., 24,) in speaking of the power of federal courts over its process, say, "The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, *if after judgment* it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the law of the United States."

Page 27—"The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the state process and proceedings as a general rule, *but under such guards and checks as might be necessary to ensure the due exercise of the pow-*

ers of the courts of the United States. They have authority therefore, from time to time, to alter the process in such manner as they shall deem expedient, and likewise to make additions thereto, which *necessarily implies a power to enlarge the effect and operation* of the process."

Having thus shown the possession of this power in the courts, the next point settled was that it was beyond the interference by the state government. Thus, p. 29,—"If the court then had the power so to frame and mould the execution in this case, as to extend to lands, the only remaining inquiry is, whether *the proceedings on the execution could be arrested and controlled by the state law.* And this question would seem to be put at rest by the decision in the case of Wayman vs. Southard. The law of Kentucky, as has already been observed, does not in terms profess to exercise any such authority; and if did it must be unavailing. An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws any farther than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the state law, but under that of the United States, which adopts that law. *An execution is* the fruit and *end of the suit*, and is very aptly called the life of the law.

"*The suit does not terminate with the judgment*; and all proceedings on the execution are proceedings in the suit, and which are expressly, by the act of Congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process according to its command. But we are not left to rest upon any implied power of the court for such authority over the officer. By the 7th section of the act of 2d March, 1793, it is declared, that it shall be lawful for the several courts of the United States, from time to time, as occasion may

require, to make rules and orders for their respective courts, directing the returning of writs and process, &c., and to regulate the practice of the said courts, in such manner as shall be fit and necessary for the advancement of justice, and especially to the end to prevent delays in proceedings."

In Peck vs. Jenness, 7 How., 612, 624, this court say,—"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; * * and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have ever attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in amity, but on necessity; for if one may enjoin another may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other."

In Ableman vs. Booth, 21 How., at p. 515, the court say: "There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign, within its territorial limits, to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government and of the state, although both exist, and are exercised within the same territorial limits, are yet those of separate and distinct sov-

ereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process, issued by a state judge or state court, as if the line of division was traced by landmarks and monuments visible to the eye." On p. 517, in speaking further of the government of the United States, the court say: * * "and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws *by its own tribunals*, without interruption from a state, or from state authorities."

In Dodge vs. Woolsey, 18 Howard, 331, great emphasis was placed upon the right of citizens of other states to sue in the courts of the Union. In that case the directors of a bank, in the State of Ohio, refused to protect the rights of the stockholders, citizens of another state, and the plaintiff claiming the right to act for himself, and denying that he was bound by their corporate action; which was hostile to his interests, and in subordination to the adverse interests of the State of Ohio, claimed as a constitutional right, that he might have the questions involved, settled by the courts of the Union. The court say, page. 356: "A citizen of the United States, residing in Connecticut, having a large pecuniary interest in a bank in Ohio, with a Board of Directors opposed in fact to the only course which could be taken to test the constitutional validity of a law of that state, is told by the directors, * * that they will not institute legal proceedings to prevent the collection of the tax, in consideration of the many obstacles in the way of resisting the tax in the state courts. * * Hundreds of citizens of the State of Ohio, and citizens of other states, are concerned in the question. Millions of money in that state, and millions upon millions of banking capital in the other states, are to be affected by its judicial decision." The court then proceed to show that this is a right which the courts of the United States are

bound to protect. If it be a constitntional right of the citizen of another state to have his suit brought into the courts of the Union, it is of no avail to him, if, when there, it may be stopped or controlled by the state courts. The object in taking the case into the federal courts, and the reason for securing this as a substantial right, it has been shown, is because the party considers it his interest to keep out of the state courts. Any practice of the circuit court which leads to such a result, or any deference to the decision of the state court, which thus abridges the constitutional right of the suitor, is plainly an error, and one of the greatest importance; the continuance of which will reduce the courts of the Union to complete subjection to those of the states.

IN SUPPORT OF THE FOURTH POINT THE FOLLOWING CASES ARE CITED:

In Commissioners of Knox County vs. Aspinwall, 24 How., 376, 383, the plaintiff having recovered judgment on railroad bonds, and the court determining that under the law of Indiana it was defendant's duty to levy a tax to pay the judgment, granted the mandamus, *in the language of the court*, "*to enforce the execution of this judgment:*" and next the court decide, that this writ of execution is issued under the 14th section of the judiciary act of 1789, referring to the powers of the court under that act, as declared by the above case of Wayman vs. Southard.

The court say, "Now it is not alleged nor pretended but that if this judgment had been obtained against the corporation in a state court, the remedy now sought could have been obtained, for it must be admitted that, according to the well established principles and usages of the common law, the writ of mandamus, is a remedy to compel any person, corporation, public functionary, or tribunal to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought

to be enforced is clear and indisputable. That this case comes completely within the category, is too clear for argument, for even assuming that a general law of Indiana permits the public property of the county to be levied on for the ordinary indebtedness of the county, it is clear that the bonds and coupons, issued under the special provisions of this act, were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which, they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect, is the writ of mandamus." The court established this doctrine, after quoting the Indiana statute that provided for a tax to pay these coupons.

A state law providing for this whole subject of issuing county bonds for public improvements, including roads, and levying taxes to pay such bonds, was brought before the Supreme Court of Iowa in 1853, in the case of Dubuque County vs. Dubuque and Pacific R. R., 4 Greene Rep. 1. The court held the law to be constitutional, and the bonds issued thereunder to aid in building railroads, to be valid. The same decision was made in the case of The State vs. Bissell, 4 Greene, 328; but in Clapp vs. County of Cedar, 5 Iowa Rep., 15, in 1857, this statute was most elaborately expounded by the court, for the declared purpose of affirming the validity of it, and the stability of the previous decisions.

This is the statute under which the bonds sued on in this action were issued, and the proceedings of the county officers, in taking the vote of the people are set out in the petition for the mandamus. That the mandamus would have issued had the judgments on these bonds been ren-

dered by the state court, is shown by the decisions of the Supreme Court of Iowa in the cases of The State ex rel. Dox vs. Johnson County, 12 Iowa, 237, decided in 1861, and State ex rel. Clark vs. Davenport City, 12 Iowa, 335. The case against Johnson County is upon the very law here cited, and holds that the bondholder, who had obtained judgment, was entitled to a mandamus.

On page 244 the court say: The debt was due, the county's faith to pay the interest each year was pledged, and should have been observed. Each year as it came around the tax should have been collected, so as not to throw the burdens of one year on another. "Good faith to the bondholders therefore demanded the levy, and no postponement should be allowed, because of, as far as shown, an inexcusable neglect of duty to make the same. * So long as the validity of the bonds is recognized, neither the agents of the counties, nor the *courts*, should countenance any action or proceedings which would tend to militate against the strict, full legal rights of the holders."

In the other case above cited, of Clark vs. Davenport, 12 Iowa, 335, the court say, p. 340: "If, however, these bonds were issued under a special law, or for some special purpose, and if the law or contract made it obligatory upon the council to levy, &c., * the relator would be entitled to the writ of mandamus to compel the performance of the act."

The power of the United States court to issue a mandamus as a writ of execution was also decided in Van Hoffman vs. City of Quincy, 4 Wall., 535. There this court denied the power of the state legislature, to withdraw the authority which had been given to lay a tax, at the time the municipal bonds had been issued, on the ground, that the remedy being an essential part of the contract, could not be impaired in the slightest degree; and that it was the duty of the United States court to execute the process of mandamus, to enforce the remedy, notwithstanding the act of interference on the part of the

state. On p. 552, the court say: "Nothing can be more material to the obligation than the means of enforcement," and the court proceed to show that the least diminution of the remedy is within the prohibition of that clause of the Constitution, inhibiting any state from doing any act to impair the obligation of contracts.

Now will it be contended that, while this case shows, that if a law of the legislature of Iowa had been passed forbidding the county officers from levying a tax to pay these coupons, it would have been void, for the want of power in the state, yet the courts of the state could exercise such power?

JURISDICTION AS TO FINAL PROCESS IN U. S. COURTS.

It has been shown that the petition for the mandamus is not the commencement of the jurisdiction of the circuit court over the subject-matter in controversy, which was whether or not it would enforce by legal process the payment of the bonds produced in court. So soon as the court decided that the bonds were the valid promises of the county, it had already decided that it would award the writ of mandamus; for rendering the judgment means, and says, too, that the court will compel payment of it. If rendering a judgment means that the court will award the proper process of execution, then the circuit court can be sustained only by holding that the mandamus was not such proper process. But this court has, upon this very point of jurisdiction, decided that proceedings begun in the federal courts, engrafted upon a suit already pending, do not stand as an original suit.

Freeman vs. Howe, 24 How., 460.

Minnesota Company vs. St. Paul Co., 2 Wall., 609.

Gwin vs, Breedlove, 2 How., 29.

This last case is much like that of the application for mandamus. It was a motion for judgment against a ministerial officer for not performing his duty, under a state

statute. The court holding this proceeding, to be an *incident in the enforcement of the remedy*, it was carried by the original suit, and no question could be raised as to jurisdiction, on the grounds that both parties were citizens of the same state.

In Duncan vs. Darst, 1 How., 301, 308, this court say, that although by law, a person arrested under process, issued by a federal court, should be discharged, yet that such discharge can not be made by a state court. "The general rule is, that an officer is not justified in obeying the order of a judge or court having no jurisdiction in the matter; and this rule applies in an especial manner, as between the state and federal courts, where it never has been supposed the judges of the one could control the process of the other. If it was otherwise, and writs of injunction, and orders to discharge defendants from imprisonment, could be granted by state courts, or judges, to render ineffectual, process issued from the courts of the United States, the jurisdiction of the latter might be, and probably would be, overthrown in parts of the Union, as it would be the exercise of the power of prohibition, and might be extended to defect the fruits of all judgments rendered by federal courts, at the discretion of state courts. A conflict of jurisdiction, fraught with more dangereus consequences, could not well be supposed."

The same principle is forcibly stated in Freeman vs. Howe, 24 How., 450, 457.

In Amiss vs. Smith, 16 Pet., 303, the court decide thus: "The provisions of the act of 1828, adopted the forthcoming bond in Mississippi as a part of the final process of that state. By final process, is understood by the court to be all the writs of execution then in use in the state courts, which were applicable to the courts of the United States; and the phrase, the proceedings thereon, are understood to mean the exercise of all the duties of the ministerial officers of the state, prescribed by the laws of

the state, for the purpose of obtaining the ~~points~~ fruits of judgment." But as to the effect and proper practice under such executions, derived from state laws, the court refused to be bound by state decisions. As to final process, "it is the duty of this court to preserve the supremacy of the laws of the United States, which they can not do without disregarding all *state laws, and state decisions*, which conflict with the laws of the United States." To the same effect see 9 Pet., 359, 360; 13 Pet., 64; 1 How., 306.

It is so manifest in the case at bar, that the state court has attempted to break in upon the jurisdiction of the circuit court of the United States; in violation of the well settled principles recognized in the above cases, that it is not deemed necessary to dwell upon the defects in the injunction proceedings, on the ground of want of privity between the parties thereto and the relator. It was not in the power of the state legislature to make the citizen of another state party to these proceedings, by any other than actual personal service; and especially could it not by any constructive notice of the proceedings, deprive a citizen of Pennsylvania of his right to prosecute his action in, and have all questions arising therein, decided by the federal court. The right to sue in that court is a substantial and important one, given by the Constitution, and which has been rigorously guarded and preserved by the United States courts. The laws of Iowa, and the proceedings had thereunder, when the bonds in question were issued, make the agreement to lay a tax a part of the contract; and it remains as such notwithstanding the proceedings in the state court, and the circuit court can carry the agreement of the parties into execution in no other manner than by issuing the mandamus under the 14th section of the act of 1789, in accordance with the decisions of this court above cited.

It is argued, that the mandamus is not, *necessarily*, a sequence to the judgment. If issued in this case, will it

not be? But here, it will issue as a matter of course.—(4 Wall., 445, 545.) The injunction is granted by the state court, on the ground that the question of enforcing the judgment is open; and is respected by the United States court, although such question had been decided adversely to the state court. In effect, the injunction is allowed to annul the judgment.

Engels vs. Lubeck, 4 Cal., 31, says, an injunction against proceeding in another court, not only binds the party; but the court also, by *comity*, will notice it, to prevent "a contempt of the process of the other." This injunction is certainly not a defence on the merits, in the circuit court. It is a technical defence, as presented, and without merits. Does comity require that it shall be allowed? The state court had no jurisdiction of the cause before it, as appeared by the record of the circuit court. The judgment estopped every member of the corporation from further opposing, by legal process, its enforcement.

The county was in court in both cases, no matter by what officers represented. This court looks to the real party in interest, and not to the nominal party. In McNutt vs. Bland, 2 How., 9, the court holds, where a sheriff's bond, for performance of his duty, was given to governor of his state, a citizen of another state has a right to sue, in the United States court, on the bond, *in the name of the governor*, although the governor, and the party sued, *are citizens of the same state.* The court say, p. 13, the governor "*is a trustee for any party injured.* He is a mere conduit through whom the law affords a remedy to the person injured by the acts of the sheriff. He can not prevent the prosecution of the suit, nor has he any control over it."

M. BLAIR,
F. A. DICK,
Of Counsel for the Plaintiff in Error.

December 11, 1867.

Dec. 7. 67. No 94

In Supreme Court United States.

THE UNITED STATES OF AMERICA,
Ex-rel. J. EDGAR THOMPSON,
vs.
THE BOARD OF SUPERVISORS OF HENRY COUNTY, IOWA, AND THE TREASURER OF HENRY COUNTY, IOWA.

MANDAMUS.

ERROR TO THE CIRCUIT COURT OF U. S., FOR DISTRICT OF IOWA.

BRIEF AND ARGUMENT

OF

RANKIN & McCRARY,

Counsel for Respondents.

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In Supreme Court United States.

THE UNITED STATES OF AMERICA,
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Brief and Argument of Counsel for Respondents.

THE FACTS.

In October, 1864, the Relator obtained two judgments in the Circuit Court of the United States for the District of Iowa, against Henry County, Iowa, upon certain coupon bonds issued by said county for stock in a Railroad Company.

These judgments remaining unsatisfied, and the Board of Supervisors of said county having failed to levy a tax for their payment, the Relator institutes this proceeding for the purpose of obtai[illegible]ng a mandamus, to compel Respondents to levy and collect the necessary tax for that purpose.

The third count of the answer or return of Respondents, which is demurred to and therefore taken as true, is as follows: "3. Respondents say that although the Relator may have obtained judgments, as set forth in his petition, yet, that he ought not to have the relief sought, and no peremptory writ of mandamus should be issued, as prayed for, to compel these Respondents to levy and collect a tax for the payment of the

judgments aforesaid. For that these respondents show to Court that before the commencement of this suit, to-wit: on the 5th day of January 1865, certain citizens and tax-payers of Henry County, Iowa, to-wit: J. B. Hart, Peter Housel, Hugh Campbell, Amos Montgomery, Daniel Turney and R. M. Pickel, presented their Bill in Chancery against the said Henry County, Iowa, and these Respondents and others, including the said Relator, J. Edgar Thompson, to the Hon. R. P. Lowe, Judge of the Supreme Court of the State of Iowa, who was authorized to grant preliminary injunctions, by the laws of said State, which Bill in Chancery, among other things, alleged that the said bonds and coupons were null and void from the beginning, that they had been held so to be void repeatedly by the judicial tribunals of the State of Iowa, and especially by the Supreme Court of said State, and the complainants in said Bill in Chancery, among other things, prayed for a writ of injunction against these Respondents and others enjoining and restraining them and each and every of them forever from levying or collecting any tax for the payment of any bonds or coupons issued or attempted to be issued by the County of Henry to aid in the construction of Railroads, and thereby referring, among others, to the coupons described in petition.

Respondents further say that on the said 5th day of January 1865, the said R. P. Lowe, Judge of the Supreme Court of the State of Iowa, having heard and examined said petition, did allow and grant the writ of injunction as therein prayed for.

And afterwards, to-wit: on the 20th day of January, 1865, the said petition in chancery was regularly filed in the District Court of Henry County Iowa, and the same is still pending therein.

Respondents further state that, as required by the order of the said R. P. Lowe, Judge, &c., the Clerk of the said District Court of Henry County Iowa, did on the 20th day of January, 1865, issue a writ of Injunction directed to these Respondents and others, as prayed for in said petition in chancery, whereby these Respondents were strictly enjoined and commanded to desist altogether from levying, or causing to be levied, any tax

for the purpose of paying either principal or interest of the coupons mentioned in the plaintiff's petition, as well as others.

And the Respondents say that the said writ of injunction was duly and regularly served upon these Respondents upon the 21st of January 1865, which was before any writ of summons was issued in this case. And Respondents say that the proceedings in said injunction suit were regular and legal throughout, and these Respondents were not parties to any suit which the Relator may have brought against Henry County, Iowa, to recover judgment upon the coupons described in the petition; that the Respondents as citizens of the said Henry County, Iowa, and as officers of said county are, and were, within the jurisdiction of said court and bound to obey its injunctions and orders; that it is not in their power now to levy or collect, or cause to be levied or collected, any tax for the payment of the said judgments described in the Relator's petition; that should they attempt to do so, they would subject themselves to imprisonment for contempt.

They further say they were served with said injunction, and with notice of said injunction suit, and became bound by the proceedings therein before any summons was issued or served in this proceeding, and before Respondents had any notice of this proceeding.

Wherefore Respondents say that the Relator ought not to have a peremptory writ of mandamus, as prayed, and they pray to be dismissed, with their costs, &c.

RANKIN & McCRARY,
Attorneys for Respondents."

The only question presented is, whether the said third count of the answer of Respondents being taken as true, shows any good ground for refusing to issue the writ of mandamus as prayed for.

We insist that the answer was sufficient, and that the demurrer thereto was properly overruled, and in support of this proposition we respectfully submit the following considerations:

It will be observed at the outset, that the mandamus cannot be granted and enforced, without compelling the Respondents

to do that which they are enjoined from doing by another court of competent jurisdiction. If the mandamus is issued by this court, it cannot be obeyed without violating an injunction ordered by one of the Judges of the Supreme Court of Iowa, and issued by the District Court of Henry County Iowa, and duly served upon the Respondents. If the mandamus is allowed the Respondents must *of necessity* disobey the one process or the other; and thus, by no possibility can they avoid liability to punishment for contempt, and that punishment is generally, if not always, imprisonment. If it be said that this result would not be the fault of the Federal Courts, we reply that nc more would it be the fault of the Respondents. They stand before this court in no attitude of contumacy. There is no intimation in their answer of any willful intent to disregard the orders of this court; but they do show us, we think, that their hands are completely tied, and that what the Relator asks of them is a legal impossibility. They are within the jurisdiction of the State Court. That Court having clearly the power so to do, has adjudged the bonds in question void, and has enjoined the Respondents from levying any tax to pay them. That Injunction has been duly issued and duly served. It cannot be said that the Respondents are not bound by it. The decisions of the State courts upon the question of the validity of the bonds, are not subject to revision by this Court. Within the scope of its jurisdiction, and as to all persons or property coming within that jurisdiction, the State Judiciary is supreme, and its adjudications final. Whatever may be thought of the propriety or impropriety of its decisions, they must be accepted as binding upon parties properly before it and persons legally brought within its jurisdiction. Should this court take the step asked in this case and issue the mandamus prayed for, a conflict must follow, and one court or the other must recede hereafter, or the Respondents must become the innocent victims and suffer in their own persons the consequences of the disagreement. This would indeed be an unfortunate result of the action of two judicial tribunals having concurrent jurisdiction over the same persons and the same subject matter. As has

been well said by one of the members of this court, "it would be a sad reproach to the law if it furnished no principle which, when properly applied, would prevent such a result." (See opinion of Mr. Justice Miller printed herewith).

Fortunately, however, such a result is not the necessary consequence of a difference of opinion between the State and Federal Courts. Men are fallible as well when acting as judges as when not, and the possibility, nay, the certainty, of an occasional difference of opinion between two courts having jurisdiction over the same questions, long ago suggested the establishment of a rule to prevent any serious conflicts—a rule which will in every case, when applied and enforced in its true spirit, promote the most perfect harmony. That rule has been thus stated by this Court:

"In all cases of concurrent jurisdiction, the court which first has possession of the subject, must decide it." Smith *vs.* McIver 7, Wheaton 532.

And again:

"There is no principle better settled than that where two or more tribunals have concurrent jurisdiction over the same subject matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other." Shelley vs. Bacon, 10 Howard 67.

We may be allowed to suggest that this rule is of vast importance to the successful operation of our judiciary system. There is, perhaps, no country in the world where so many distinct tribunals have a right to exercise complete jurisdiction over the same subject matter. And, to enable the State and Federal Courts, sitting in the same places, administering justice for the same people, and over the same subjects, to work smoothly, the rule we have stated is of inestimable value.

We submit that under this rule the mandamus asked in this case cannot be granted, and that, the answer of Respondents is sufficient.

And in the first place, we insist, that as to the subject matter of this suit, and as to the persons of the respondents, the State and Federal Courts have concurrent jurisdiction.

What is the subject matter of this proceeding? It is the levy of a tax to pay the Railroad bonds. It is true that the bonds in question are now in the shape of a judgment in the Circuit Court, but the Board of Supervisors are no more bound to levy the tax than if no judgment had been rendered. The mandamus, if issued at all, must be issued on the ground that it was the duty of the Board of Supervisors to levy the tax to pay the bonds, independent of the judgment. It is not for the payment of every judgment against a county that the court would compel the levy of a tax, even in the absence of any injunction against such levy. There are many judgments for the payment of which the Board would have no power to make such levy. In every case the court would look behind the judgment to ascertain whether the debt was one for the payment of which the Board had power to levy tax. This Board of Supervisors is a creature of the Statute of Iowa, and can only levy such taxes as it is authorized to levy by express provision thereof. See Revision of 1860, Chapter 45.

If the Relator had simply alleged that he had obtained judgment against Henry County, without stating the nature of the claim upon which he obtained it, no lawyer will say that his petition would have been sufficient, because it is not the judgment which gives him the right to a mandamus, if he has such right, but the ownership of the bonds themselves.

In Knox County vs. Aspinwall, 24 Howard, 376, the mandamus was granted, not at all upon the ground that a judgment had been obtained upon the bonds, but because the statute of Indiana made it the duty of the Commissioners of the County to levy a tax to pay the bonds themselves. But it is immaterial what form of speech we use, for whether we say that the levy of taxes is sought to pay the bonds, or to satisfy the judgment, we mean the same thing. The nature of the debt is in no sense changed by being merged into a judgment. It is still the same debt.

We are, therefore, right in saying that the subject matter of this suit is the levy of a tax to pay the bonds (or some of

them) issued by Henry County, in payment for stock in a certain Railroad Compauy.

Over this subject matter we admit that the Circuit Court of the United States sitting in Iowa has, in a proper case, jurisdiction, and its having jurisdiction gives it power either to compel or prohibit the levy of such tax. But we assert, further, that the District and Supreme Courts of the State of Iowa have jurisdiction over precisely the same subject matter. This will not be denied, and needs no proof. It follows, then, that neither the State nor Federal Judiciary, have exclusive jurisdiction over the subject matter of this proceeding. Either may compel the levy of the tax in question, and either may prohibit it.

Nor can it be said that the Circuit Court sitting within the State of Iowa, *in construing and enforcing the Constitution and laws of Iowa*, is in any sense superior to the State Courts. The Federal Courts are unquestionably the final judges of all questions arising upon the construction of the Constitution of the United States and the acts of Congress, but in construing and enforcing the State Constitution and laws they stand upon a perfect equality with the tribunals created by the Constitution of the State for that purpose.

The perfect equality of the State and Federal Judiciary in the exercise of their respective functions is clearly recognized by this Court, in the case of Pulliam vs. Osborn, 17 Howard, 471, and the many cases there cited, of which we shall have more to say hereafter. It is, then, strictly correct to say that the Circuit Court of the United States, for the District of Iowa, and the Supreme Court of Iowa, and the District Court of that State, for the District embracing Henry County, have concurrent jurisdiction over the matter of levying taxes in said Henry County, and consequently, over the subject matter of this suit.

We insist, in the next place, that the State Court which issued the injunction, has first exercised jurisdiction, and may, therefore, rightfully keep it.

Of course, this proposition involves the inquiry, *when* was

this suit commenced? There can be no dispute as to the date of the commencement of the injunction suit in the Iowa Court. The writ was ordered January 5th, 1865, was issued January 20th, 1865, and served January 21st, 1865. Notice or summons was issued and served at the same time with the writ.

The rule is well settled that an action is, in law, commenced when process is issued.

Cheetham vs. Lewis, 3 Johns, N. Y. Rep. 42. Ross vs. Luther, 4 Cowan, 162. Fowler vs. Sharp, et. al., 15 Johns, N. Y. Rep. 323. Bird, et. al., vs. Caritat, 2 Johns, N. Y. Rep. 345. Lyle vs. Bradford, 7 Monroe, Ky. 111. Pendell vs. Maydwell, 7 B., Monroe 315. The summons in this case was issued on the 31st day of January, 1865, and served on the 6th day of March, 1865. Whether we regard the suit as commenced at the time of issuing the summons, or at the date of its service, in either case the injunction proceeding was first instituted, and the State Court first got possession of the subject matter of this suit.

The rule of law, to which we have referred as governing Courts of concurrent jurisdiction, will, we apprehend, not be seriously controverted. Nor will it, we think, be contended that the Circuit Court and the State Courts are not Courts of concurrent jurisdiction as to the *res gesta* of this proceeding. But it will, no doubt, be contended that this mandamus proceeding is not an original suit or action at law, in and of itself, but simply a part of the original suit on the bonds in which the Relator obtained his judgment, and that, therefore, the Circuit Court, when this proceeding was commenced, obtained a jurisdiction over the Respondents, *dating from the time of the commencement of the original suit on the bonds.* And this brings us to the discussion of what we conceive to be the important question of the case.

We insist that the Circuit Court had jurisdiction over the Respondents, and over the subject matter of this suit, only from the date of the commencement of this mandamus proceeding. And in support of this proposition we have to say:

1. That the position taken by the other side, is based upon

an entirely mistaken view of the nature of this proceeding. It is not a part of any other suit. It is, in no legal sense, a continuation of the former suit. It is a suit at law, perfect and complete in itself.

"Since this statute, (9 Ann., chap. 20, Sec. 2,) a mandamus is in the nature of an *action*—special replications and pleadings therein being admitted, and costs awarded to either side that prevails." Bacon's Ab., Vol. 4, p. 523.

"That the proceeding on a mandamus is a *case*, within the meaning of the act of Congress, has been too often recognized by this Court to require any particular notice. It is an *action* or *suit* brought in a court of justice asserting a right, and is prosecuted according to the forms of judicial proceedings." Kendall vs. U. S., 13, P. 615.

"A mandamus, in modern practice, is nothing more than *an action at law* between the parties, and is not now regarded as a prerogative writ." Com. of Ky. vs Dennison, 24 How., 97.

See, also, Kendall vs. Stokes, 3 H. 100, where it is held that a mandamus is a suit, and as to the subject matter involved in it is, therefore, a bar to any subsequent proceeding. In that case this Court says:

"The remedy in that form (mandamus) originally was not regarded as an action by the party, but as a prerogative writ, commanding the execution of an act where, otherwise, juctice would be obstructed, and issuing only in cases relating to the public and the Government, and it was never issued when the party had any other remedy. It is now regarded as *an action by the party* on whose relation it is granted, but subject, still, to this restriction: that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring *another action* for the very same cause, after he has obtained the benefit of the mandamus, would not only be harrassing the defendant with *two suits* for the same thing, but would be inconsistent with the

grounds upon which he asked for the mandamus, and inconsistent with the decision of the court which awarded it."

It seems to us that these authorities are sufficient to establish the proposition that this is not a part of the suit on the bonds, but is a "suit," an "action," complete within itself, and independent of any other suit, and is, therefore, a case in which the Circuit Court had jurisdiction only from the date of its commencement.

2. We remark further, that this must be regarded as a suit separate from, and independent of the suit on the bonds, because an examination of the record shows that it has all the attributes of a new and original suit. The ordinary declaration is filed by the Relator. He does not regard the Respondents as in court by virtue of the former suit, and, therefore, he issues the ordinary summons, which is regularly served. The cause is docketed as a new cause. It does not appear from the declaration that the Relator intended to make this a part of the former suit, or that he had any such idea when this suit was brought. The fact that it is unquestionably necessary in this case to take every step which it is necessary to take in any other suit, goes far to establish the point we make, viz: that it is in itself a complete suit, lacking nothing, and not simply a continuation of another suit. Suppose a motion had been made in the original suit for a mandamus against these Respondents to compel them to levy a tax, without the filing of a new declaration, without the issuing of a summons, and without making Respondents parties, would it be contended that in such a case it could have been granted? Clearly not. And yet if this application is to be considered as a part of the original proceeding, why not? It is difficult to perceive how it can be necessary to commence by filing a new declaration, and to follow that up by a summons, and pleading, trial, and judgment, if this is but a part of the former suit.

3. This must be regarded as a new suit, because it is not between the same parties. The former suit was against Henry County, Iowa—a corporation—in law, a person, capable of being sued, and of acquiring and holding property. The pre-

sent suit is against the Board of Supervisors and Treasurer of Henry County, Iowa. The Respondents were none of them parties to the suit on the bonds. This is averred in the answer and admitted by the demurrer. Admitting that the Relator in this case was the plaintiff in the suit on the bonds, we submit that it is simply absurd to say that the two cases are but one, while it is admitted that the Respondents here were not parties to the former suit, and that the defendant in the former suit (the County of Henry) is not a party to this.

To show conclusively that the Repondents were not parties to the suit on the bonds, we quote the definition of "parties" as given by Bouvier in his Institutes, vol. 3, page 373, as follows: "The term parties, as has already been explained, includes all persons who are directly interested in the subject matter in issue, who have a right to make defense, control the proceedings or appeal from the judgment. *Strangers* are persons who do not possess those rights."

Clearly, then, the Respondents were strangers to the suit on the bonds. In their official capacity they could have had no direct interest in the suit; they had no right to make defense, no right to control the proceedings, and no right to appeal from the judgment.

4. This is a new suit, and separate and distinct from the former in that, the subject matter of the two are not the same.

The object of the suit on the bonds was to recover a judgment. The object of this proceeding is to compel the levy of a tax.

It was in no sense the object of the former suit to compel the levy of a tax. That cannot be said to have been any part of the subject matter of that suit. As we have already said, the right of the Relator to compel the levy of a tax, does not grow out of his having a judgment. He could have applied for his mandamus as well before as after his judgment. The Board *is* authorized by law (if the law is valid) to levy a tax to pay the bonds and coupons, but it is not empowered to levy for the payment of a judgment as such. The only value a judgment on the bonds could be to a party asking a mandamus,

would be as evidence, to show that he owned the bonds or coupons, and the sum due thereon.

It is manifest, then, that the two suits are not only between different parties, but also, that they are instituted for totallly different purposes, and that the subject matter of the one is widely different from that of the other.

5. The idea that a mandamus will issue as process for the enforcement of a judgment, in the event of a failure to make the money on execution, is novel, indeed, and without the shadow of support, either in reason or authority. There is but one writ which issues to enforce a judgment at law, and as a part of the suit, and that is the writ of execution. It is true, that it often happens that the plaintiff in judgment fails to make his money by the use of his execution, and has, therefore, often to resort to some other remedy. But when the execution fails he can ask for no other process in the same case, but must resort to another suit. It is a common thing in practice to resort to a bill in chancery for the purpose of collecting a judgment in cases where the execution fails, but there is not, we venture to say, among the numerous cases of this kind, a single one in which it has been held that the court in which the creditor's bill is filed, gets a jurisdiction dating from the commencement of the original suit. If the court which is applied to for a mandamus to aid in the collection of its judgment, may assume that its jurisdiction in the mandamus case reaches back to the commencement of the original suit, why not the same thing when a creditor's bill is filed for the same purpose? There is no difference in principle between the two cases, unless the mandamus is to be regarded as "process" *issuing upon the judgment*, and this, we think, cannot be for a moment believed. The most that can be said of this mandamus proceeding is that it is a suit instituted in aid of the execution, or to create a fund on which the execution may be levied. Such is precisely the fact in every case where a creditor's bill is filed. Now, there is no manner of doubt, but that the court in which proceedings are first instituted against the judgment debtor or his property, will keep the control to

the exclusion of all other courts of concurrent jurisdiction, regardless of the dates of their respective judgments, unless they constitute liens upon the property in question. It has been settled by this Court that in cases where several executions are issued from the State and Federal Courts, against the same defendant, the execution first levied must be first satisfied, regardless of the dates of judgments. (Pulliam vs. Osborn, 17 Howard, 471.)

This is the very doctrine for which we contend, viz: *That where judgments in the Circuit Court do not constitute a lien upon any given property, such property may be taken possession of by a State Court after the judgment, but before a levy, (or, which is the same thing, before the filing of a creditor's bill, or other similar proceeding against it,) and in such case the State Court will keep the control of such property.* It seems to us that it might, with more force, be contended that the execution from the Federal Court, when levied, would give jurisdiction from the date of the judgment, than that a writ of mandamus issued in *another suit, against other parties*, to compel the levy of a tax to pay the judgment, gives such jurisdiction. The difference between the two cases is this: that in the former the process is issued upon the judgment, and is a part of the regular proceedings in the suit, while in the latter, as we have shown, a new suit is commenced, and the mandamus, if issued, is not by virtue of the judgment, but by reason of the case made out in such new suit. It is quite evident that the doctrine of Pulliam vs. Osborne, and of the cases there cited, when applied to this case, must determine it against the Relator. In that case, the District Court of the United States, sitting in Alabama, instructed the jury, "that a sale under a junior execution from the State Court did not divest the lien of the execution from the District Court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the State Court." This instruction was held erroneous, and the judgment was reversed by this Court, and yet we submit that the argument for the doctrine of that instruction was the same in kind, though much stronger, than that now presented in behalf of

the Relator. We have only to substitute an execution for the mandamus, and the levy upon the defendant's property, for a service upon Respondents, to make the cases identical. Surely, it cannot be maintained that a mandamus would be more potent to oust the jurisdiction of the State Court over the property of Henry County, than an execution would have been; and yet such must be the reasoning to get rid of the force of the decision we have just cited.

6. We are aware that it will be urged that without the allowance of a mandamus the Relator's judgment cannot be collected. If this were true, the law would remain as we have stated it. There are many judgments which cannot be collected. The same result would have followed, perhaps, if an execution issued upon Relator's judgment had been levied the day after a State Court had through its process levied upon the property of the County subject to execution, but this Court would, nevertheless, adhere to its well settled and salutary rule, of yielding the property to the State Court in such cases. Besides, this outcry about losing the right to collect the Ralator's claim against Henry County, begs the whole question. The State Courts had a right to decide the bonds void. It was a mere question of law, properly presented to a competent tribunal to decide. Having so decided, the State Courts have a perfect right to enjoin the levy and collection of a tax for their payment. All this they had a right to do, precisely as they have done. The Circuit Court had an equal right to decide the bonds valid, and to render judgment upon them. The State Court can only enforce its decision by enjoining the collection of a tax. The Federal Court can enforce its decision by compelling the levy of a tax. Now, it is quite as proper for the tax-payers who have obtained the injunction to cry out that their decree will be a nullity if the mandamus is allowed and enforced, as it is for the Relator to say that his judgment will do him no good if the injunction is allowed to have any force and effect.

The complaint of the loss of a legal right comes with as much grace from the one party as from the other. So long as

this Court holds the bonds valid, it must render judgments upon them and issue executions to enforce them, but it will not go to the extent of attempting to take from the State Courts the control of matters over which they have properly assumed jurisdiction, in order to enable the plaintiffs in such judgments to make their money on them. This Court may believe the decisions of the State Courts erroneous, but it will not, therefore, be justified in treating them as a nullity. To do so, would be to set a dangerous example, which, if followed, would certainly result in constant conflict and confusion.

There are other objections to granting the mandamus asked, which we deem good and sufficient. We now proceed to state some of them:

1. A mandamus is not a writ of right, but may be granted or refused, in the discretion of the Court to which the application is made. Bacon's Abridgment, vol. 4, p. 515. Angel & Ames on Corporations, p. 631, S. 2. Van Rensalaer vs. Sheriff of Albany, 1 Cowan, (N. Y.) p. 512. Gowry vs. Mills, 1 Ark., p. 11.

We think there is no case to be found wherein it has been held that the writ of mandamus is a writ of right, or that the granting or refusing it is not a matter resting exclusively within the discretion of the court to which the application is made.

Will this Court interfere with the exercise of the discretion of the Circuit Court? It seems to be settled that it will not. Turner vs. Yates, 16 Howard, 14.

2. A mandamus has been, by this Court, defined to be "a remedy to compel any person, corporation, public functionary or tribunal, to perform some duty required by law, where the party seeking relief has no other remedy, and the duty sought to be enforced is *clear and indisputable*." Board of Commissioners of Knox County vs. Aspinwall, et. al., 24 Howard, 383. Is this a case where the duty sought to be enforced is "clear and indisputable?" It seems to us that so far from this being the fact, taking the answer of Respondents as true, it is not a duty at all; but if there be a question, a doubt, a

debatable proposition, if there is any uncertainty as to the duty of the Board under all the facts, to levy the tax, then, of course, the duty is not "clear and indisputable," and cannot be enforced by mandamus. And this definition is well sustained by other authorities.

Is there no doubt as to the duty of the Board? Is it clearly and indisputably their duty to violate the Injunction by which they are bound, and subject themselves to imprisonment by levying a tax? Is the pecuniary accommodation of the Relator "indisputably" of more importance than the personal liberty of the Respondents?

3. As a general rule, a court will not grant a mandamus to compel a party to do an act which he has been enjoined from doing by a court of competent jurisdiction. This rule is sustained by the following authorities:

Exparte Fleming, 4 Hill, (N. Y.) Rep. 581. This is a case wherein the Common Pleas Court of Onondaga County had decided to commit one Williams for fraud, under a certain statute of New York, and had, accordingly, rendered judgment of commitment, but before issuing the warrant of commitment the Judge was enjoined from proceeding further by an injunction issued by the United States District Court. Application was made to the Supreme Court of New York for a mandamus to compel him to proceed, notwithstanding the injunction. It would seem to us that if ever there was a case in which a court might say that another court of equal jurisdiction had acted without authority, this is one, and yet the Supreme Court of New York refused the mandamus, and in the opinion, Judge Cowan says: "It is certainly impossible for me, on the case stated, to see expressly that the injunction was properly issued; but it is not my duty to inquire whether it was or not. I am not prepared to deny that under (some) circumstances it might have been properly issued, but if I were, it is enough to know that Judge Conkling has power to issue the process of injunction like any other chancellor. If it has been improperly issued, I am bound to suppose that he will set it aside on motion. He having jurisdiction, it is the same thing to me as

if it had issued from the Court of Chancery of this State. Before I should be warranted in compelling a ministerial officer to disregard it, I must be satisfied, in the strong language of counsel, that the ordering of the writ was *a mere act of usurpation*, &c." And, again: "I am, therefore, called upon to order the doing of an act by Judge Lawrence which would be in direct violation of a valid injunction, and subject him to punishment accordingly."

The rule for which we contend is thus laid down by Judge Cowan in the opinion from which we are quoting:

"No Court ought to compel either parties or ministerial officers to put themselves in positive conflict with the order or writ of another Court."

It is also held in this case that the writ of mandamus is a process which may be granted or withheld, at the discretion of the court, and it is said, with much force, we think, that "it would be very indiscreet to place the Judge (Lawrence) between two fires, as we should do by granting this motion" for a mandamus.

The Ohio & Indiana R. R. Co. vs. the Commissioners of Wyandotte County, 7 Ohio State Reports, 278. This was a case in which the people of Wyandotte County had voted to subscribe to the capital stock of said Railroad Company, and it became, therefore, by law, the duty of the Board of Commissioners to make such subscription. The suit was brought to obtain a mandamus to compel the Board to make the subscription. The Board answered, among other things, that they had been enjoined by the Court of Common Pleas of Wyandotte County from making the subscription. It will be seen that the case is not unlike the one at bar. The mandamus was refused solely on the ground of the injunction, and this, notwithstanding the R. R. Company was not a party to the injunction. In this respect ours is a stronger case than that, for the Relator was a party to the injunction which we set up. (See answer.)

We quote a brief passage from the opinion of Brinkerhoff, Judge in the case just cited. He says:

"If the peremptory writ of mandamus were to issue and the defendants failed to obey it, they would be liable to process for contempt, while on the other hand, if they obeyed it they would be equally in contempt for disobedience to the decree of injunction. Even where the order or decree of injunction is made by a court of competent jurisdiction other than that in which the mandamus is sought, the latter will not thus *place a party between two fires by subjecting him to contradictory orders.*"

The same rule is maintained by the following cases:

5 Gilman, (Ill.) 243, People vs. Gilman. 29 Barbour, (N. Y.) 94, People vs. Commissioners of Sewers. And, we believe, no case can be found where a contrary rule has prevailed.

In perfect harmony with these authorities is the decision of this court in the case of the Life and Fire Insurance Company of New York vs. Adams, 9 Peters, 571, 573. In this case the property in controversy was conveyed by mortgage to petitioners. Proceedings had been instituted to foreclose the mortgage, and decree for that purpose rendered.

Afterwards, the mortgagor becoming insolvent, his property, including that which was mortgaged as aforesaid, and against which decree had been rendered, passed into the hands of a Syndic, and as was claimed, became subject to the control of one of the State Courts of Louisiana. The Syndic forbid the Marshal to levy the execution issued upon the decree of foreclosure, and the Marshal refusing to levy, this suit was instituted, among other things, to compel him to do so by mandamus. Under these circumstances this court refused to grant a mandamus, on the ground that it was not just "to compel the Marshal to do that for the benefit of others which might involve him in litigation and possibly in damages." The main point established by the decision is correctly stated in the syllabus, as follows:

"A mandamus ordering the District Court to render a judgment not according to its views of the merits, but according to the views of this court, or to compel the Marshal to execute a

judgment upon property, *the title to which is in dispute refused.*"

This court had no doubt but that the property was, in fact, fully and completely within the jurisdiction of the District Court, and that opinion was freely expressed by Mr. Justice McLean, but so careful was the court not to involve an innocent ministerial officer in any possible difficulty, that it refused to order the Marshal to proceed. If it was not right to grant a mandamus to compel the Marshal to sell the property in that case because the State Court might insist upon its right to exercise jurisdiction over the property, and the creditors claiming an interest in it might sue him for damage, surely the court will not hesitate to refuse the writ in this case, when it is ascertained that the certain result of granting it would be to subject the Respondents, without any fault of theirs, to imprisonment for disobedience to the orders of one or the other of the courts.

We notice briefly two or three of the authorities relied upon by counsel for Relator:

Wyman vs. Southard, 10 Wheaton, 1. The point decided in this case was that the Federal Courts have power to issue executions for the enforcement of their judgments. It was contended that under the 14th section of the Judiciary Act of 1789, chapter 20, which gave the Circuit Courts power to issue all writs not specially provided by statute, "which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," there was no power given to issue an execution. The court held this an erroneous construction of the Act of Congress, and in delivering the opinion the court says: "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act to suppose an execution necessary to the exercise of jurisdiction."

It is clearly a perversion of what is here said to attempt to

make it authority for issuing a mandamus as process for the enforcement of a judgment. It is said that "jurisdiction continues until the judgment is satisfied," but for what purpose, we ask? Evidently for the purpose of issuing process subsequent to the judgment, such as belongs to the judgment and grows out of it. To understand and properly apply the language used, we must keep in mind the point to which the mind of the court was at the time directed. That point was the right of the court to issue executions, and all that was said was with reference to that. How absurd, then, to say that this decision means that the Circuit Court, when it renders a judgment, can prevent other courts, by proper proceedings, from thereafter getting jurisdiction of the defendant or his property, *or of third parties having control of his property.* Unless it can be maintained that a mandamus is process issuing upon a judgment like an execution, the decision in the case under consideration cannot be made to sustain the position of the Relator.

Commissioners of Knox County vs. Aspinwall, 24 Howard, 376. This case decides that the Circuit Court has power to issue a writ of mandamus to compel the levy of a tax to pay a judgment where that judgment is rendered upon bonds of a county, and where, by statute, it was the duty of the Respondents to levy such tax. It decides nothing more. It does not hold that a mandamus is "process" like an execution. It does not hold that it issues as a part of the original suit. It does not hold that it is not a new suit. It can have no possible bearing upon the questions raised and relied upon by Respondents in this cause. In one respect that case differed materially from the present case. The suit in that case was brought for mandamus against the original defendants against whom the judgment had been rendered, so that the parties in the original and in the mandamus case were the same, while in this case, as we have seen, they are different. (See 21 Howard, 539, where the original case is reported.)

McKim vs. Voorhies, 7 Crouch, 279. In this case it is decided that a State Court cannot enjoin a judgment of the

Federal Court. This has not been attempted. The Relator may have any process which his judgment authorizes; it remains in full force and vigor. What is meant by enjoining a judgment? Clearly it means to enjoin the issuing of an execution thereon, to declare the judgment itself a nullity, and to hold it for nought. When a judgment is enjoined the party who obtained it, and the court which rendered it, are estopped from taking any steps towards its collection. But here the Relator is not denied by the injunction a single right which his judgment gave him, for his judgment did not give him a right to a mandamus against Henry County even, much less as against the Respondents, who were not parties to the judgment. To show that the injunction to restrain the collection of the tax does not *even in effect* amount to the enjoining of the judgment, it is only necessary to say that the property of *Henry County is not, by the law of Iowa, exempt from execution*, and, therefore, the Relator may, at any time, issue an execution and levy the same on any property of the county. It is simply absurd to say that a judgment is enjoined when this can be done.

These are, perhaps, the strongest cases that will be cited against us. At least, they are fair specimens of the authorities which will be relied upon by counsel for Relator.

We think we are safe in saying that no respectable authority can be found to controvert the following propositions which we have endeavored to establish and upon which we rely:

1. That as to the subject matter of this suit the State and Federal Courts are courts of concurrent jurisdiction.

2. That the court which first got possession of the subject matter of this suit, viz: the levy of a tax, must keep the jurisdiction.

3. That a proceeding to obtain a mandamus is a suit, and jurisdiction therein commences with the issuing of the summons.

4. That the purpose of the original suit upon the bonds was to obtain a judgment, and not to procure a mandamus or compel the levy of a tax, and that these things were not included within the scope of the original suit.

5. That a mandamus is in no just sense "process" issuing upon or growing out of a judgment at law, and that this is, therefore, not a continuation of the original suit.

6. That as the Respondents in this case were not parties to, or in any manner bound by the original judgments, this suit is of necessity an original suit as to them.

7. That the application of these principles to this case brings us inevitably to the conclusion that the injunction proceedings were first instituted, that the Respondents became first bound thereby, and that the mandamus asked must consequently be refused.

8. That, independent of these principles, it is a well settled rule, to which no exception can be found, that no court will grant a mandamus to compel a ministerial officer to do that which he has been enjoined from doing by another court of competent jurisdiction.

9. That the Circuit Court was authorized in deciding the application for mandamus to exercise a discretion, and in such cases it has never been the practice of this court to interfere.

We submit herewith an opinion of Mr. Justice Miller, in which the doctrine applicable to this case is fully and ably discussed, and we respectfully call attention thereto.

All of which is respectfully submitted,

RANKIN & McCRARY,
Counsel for Respondents.

In Circuit Court United States---District of Iowa.

OPINION BY MR. JUSTICE MILLER.

CHARK DURANT,
vs.
THE BOARD OF SUPERVISORS OF WASHINGTON COUNTY. } *Mandamus.*

MARCUS RIGGS,
vs.
THE BOARD OF SUPERVISORS OF JOHNSON COUNTY. } *Mandamus.*

JAMES GRANT,
JOHN N. ROGERS, } *For Plaintiff.*

HENRY STRONG,
S. H. FAIRALL, } *For Defendants.*

Present—Justice Miller and Judge Love. Mr. Justice Miller delivered the opinion of the Court.

These are cases commenced against the Board of Supervisors of Washington County and of Johnson County respectively, to compel them to levy taxes to pay judgments rendered in this Court against those Counties on interest Coupons attached to bonds given for Railroad Stock. The alternative writ of mandamus has been issued in each case, and in each the defendants have made a return setting forth that they have been enjoined from levying such tax by the District Courts of their respective counties, at the instance of the tax-

payers thereof. We are now asked to issue the peremptory writ ordering them to levy this same tax which the District Court has, by its injunction, forbid them to levy. The counsel for the Relators, for the purpose of avoiding the difficulty interposed by those injunctions, has attempted to draw a distinction between the levy of a tax to pay the interest coupons, and one to pay the judgment rendered on those coupons. The distinction is without foundation; the debt is the same; it is still a debt for interest on Railroad Bonds, and has not, nor cannot, lose that character by being carried into judgment. The judgment has only given the sanction of the Court to the validity of the debt, but has not changed the character of its origin, or caused it to be any the less a debt for interest on bonds issued in payment of railroad stock.

The question here presented is one of the gravest importance, looking directly to a conflict between the State and Federal Judiciary. If this Court shall issue the writ as prayed, the defendants must disobey the order of this Court or the injunction of the State Court, and, in either event, render themselves liable to be punished by imprisonment for contempt of that Court whose order they disobey.

It would be a sad reproach to the law if it furnished no principle which, when properly applied, could prevent such a result. And it becomes the duty of this Court to pause and inquire into the matter fully before it is committed to a course of action from which there is no creditable retreat.

As a ready solution of the difficulty, it has been argued that the Federal is, in all cases of supposed conflict of jurisdiction, superior to the State Courts, and that the latter must submit. In support of this proposition, that clause of the Federal Constitution which makes that instrument and the laws and treaties made in pursuance thereof the supreme law of the land, anything in the laws of the State to the contrary notwithstanding, is relied on; and it is beyond dispute, that where there is a conflict between the State laws and a Constitutional Act of Congress, the former must yield, and, that the Federal Courts are the final judges in such case.

But in the case before us there is no such conflict; both parties here claim their rights under the laws of the State of Iowa. These laws are administered by the State Courts of Iowa, and by the Federal Courts sitting in Iowa, on terms of perfect equality.

These Courts are, as to the questions presented in this record, Courts of concurrent jurisdiction. I take the rule to be, without exception, that the judgments of Courts of concurrent jurisdiction are placed upon a perfect equality as to their force and validity, and the Courts themselves are, as to the subjects over which they have concurrent jurisdiction, of equal power and authority.

The subject matter of the suits which we are considering, both those in which injunctions have been issued in the State Courts, and those in which we are now asked to issue writs of mandamus, is the levy of taxes to pay these coupons. The right of a State Court, at the suit of the tax-payers of any municipal corporation, whether county, town, or township, to restrain the authorities from levying a tax, is, in a case properly made out, beyond question. The Federal Court has the same right of interference in favor of a non-resident property-holder, as is shown by the case of Gilman vs. Sheboygan, 2 Black, p. 510. So, also, no doubt can be entertained that the State Courts have a right, in a proper case, to compel their authorities to levy a tax by writ of mandamus; and that the Federal Courts exercise this power, is established by the case of Aspinwall vs. the Commissioners of Knox County; 24 Howard, p. 376. In reference, then, to the right to compel or prohibit the levy of a tax by the Supervisors of a county, the jurisdiction in the State and Federal Courts is concurrent.

In order to prevent such conflicts as threaten to grow out of the matter before us, in cases of concurrent jurisdiction it has been established as a rule that the Court which first obtains jurisdiction of the case shall have the exclusive right to decide the matter in issue, and that any other Court which may have subsequently assumed to act in the matter, must, when the fact

of this priority of jurisdiction is brought to its attention, proceed no further.

This principle is so necessary, and is so well recognized in all Courts, that no authorities need be cited to prove it; and when properly applied, in the spirit of comity which should actuate all Courts, will be found sufficient to prevent unseemly collision between them.

In the cases now before us, the writs of injunction were issued from the State Courts before the application for a mandamus was made to this Court. It would, therefore, seem to follow that, as the State Courts had first obtained jurisdiction, and had, indeed, made their order of injunction before the powers of this Court were invoked, according to the rule above stated, this Court must respect the action of the State Court, and proceed no further. In the case of Durant vs. the Supervisors of Washington County, there can be no doubt but this reasoning is correct, for in that case the injunction was issued several years before the suit was commenced in this Court to obtain judgment on the coupons, and the plaintiff in the judgment, the Relator in the present application, was made a defendant in the proceeding in the State Court in which the injunction was ordered.

But it is said that in the case of Riggs vs. the Supervisors of Johnson County, the rule must produce the opposite result, because there this Court first obtained jurisdiction; and to sustain this position, it is argued that the mandamus now prayed for, is nothing but a continuation of the suit of Riggs vs. Johnson County, in which judgment was obtained on the coupons.

It is very true that the object of the present proceeding is to compel the payment of the debt for which that judgment was rendered, but is the writ of mandamus so far an ordinary consequence of a judgment at law, or so far one of the usual incidents of such a judgment, that this writ is to be issued, as a matter of course, or is it a new case, bringing before the Court new parties, new subject matter of litigation, and involving a new and different remedy? The suit on the coupons was in the name of Marcus Riggs vs. Johnson County. The

present application is in the name of the United States on the relation of Riggs vs. the Board of Supervisors of Johnson County. Although we may concede that the name of the United States as plaintiff, is nominal, and that Riggs is the real plaintiff, yet this concession cannot be made as to the defendants.

The County of Johnson, defendant in the first suit, is a distinct corporate entity, sueable by that name alone, and cannot be sued in the name of the Supervisors. These latter are now sued in their name of office distinctively, and a personal service growing out of that office is required of them, and not of the county. So far as parties are concerned, it is a new suit.

The subject matter of the present proceeding is the levy of a tax, and the purpose of it is to compel such a levy. Was that the subject matter of the suit of Riggs vs. Johnson County? And was that the purpose for which he brought that suit? It is no answer to say that the ultimate design of that suit was to enforce the payment of the coupons on which it was founded, and that the ultimate object of this proceeding is the same. Four-fifths of all the legal proceedings in courts of justice have for their object the enforcement of a monied demand, yet perhaps a suit at law, or suit in chancery, and perhaps other judicial proceedings, may all be progressing at the same time, for the enforcement of the same demand, without conflict of jurisdiction. Why? Because they may proceed in different modes, have jurisdiction of different remedies, and of different subject matter; one satisfaction would stop all the proceedings, but until that is made, a party may proceed at law against the party for a personal judgment, and in chancery to foreclose a mortgage, and perhaps in some other manner for a tort, all arising from the same matter and leading to the same result.

It proves nothing to the purpose, therefore, to say that the common ultimate object of the suit of Riggs vs. Johnson County, and the mandamus against the Supervisors, is to collect the same money demand. In stating the subject matter of each suit, and the relief sought by each action, it would, in

direct legal phraseology, be said that the suit of Riggs vs. Johnson County, was brought to recover a judgment, and the mandamus to compel the levy of a tax.

If a defendant has a judgment rendered against him in the State of Illinois, and nothing can there be found to satisfy it, the payment of that judgment may be enforced in the State of Iowa, if property of the defendant can be found here of sufficient value. This can only be done by the commencement of a new suit in some of the courts, State or Federal, having jurisdiction in this State. In such a case the new proceeding is as closely connected with the former judgment in Illinois as the present application for mandamus is with the judgment it is intended to enforce. In both cases the new proceeding is founded upon, and grows out of the former judgment. Indeed, the comparison is in favor of the mandamus as a new proceeding, for it is against new parties who are not bound by the former record; and what, in my judgment, still more characterizes it as a new suit, is, that the right to the mandamus does not depend on the existence of the judgment. If it is the duty of the County Supervisors to levy a tax to pay these coupons, that duty can be enforced by mandamus before judgment as well as after. The duty, if there be one, grows out of the legal obligation in the Supervisors to levy a tax, which, it is charged, was voted by the people, and this duty is in no sense varied by a judgment rendered on the coupons. As there is no other mode by which the Supervisors can be compelled to perform this duty, if it exists, mandamus is clearly the proper remedy. That this is the view taken, also, by the counsel for plaintiff, is clear, from the particularity with which the agreement to levy this tax, and the vote of the people thereon is set forth in the information and alternative writ.

Again, after judgment and execution returned as unavailing, various new suits may be instituted in aid of that judgment—some to set aside fraudulent conveyances, others to subject equitable interests to its satisfaction; and perhaps the most common and effectual of these is the creditor's bill, by which all concealed property of the defendant, both real

and personal, legal and equitable may be subjected to the satisfaction of that judgment. The acknowledged purpose of this class of bills is to aid the judgment at law, to render it effectual, to enforce it, and compel its payment. These bills are, however, new suits, commenced in another court, where the chancery and law courts are separate, and none the less a new and original proceeding where common law and chancery remedies are administered by the same court. They are often brought against new parties.

A bill of this character is as much founded on the judgment at law as the mandamus asked in this case can be; the object is as much to aid in enforcing the judgment as this suit is, and the relief in that case as in this, is by reaching means not subject to writs of execution, by which judgments for money demands are ordinarily enforced, and by reaching persons not previously parties to the proceeding.

Yet no one will deny that if after judgment rendered against a defendant, any other Court by regular proceedings gets jurisdiction of him and his equitable property, or any other property on which the judgment was not a lien before, the creditor's bill subsequently filed does not, and cannot, deprive that Court of the right to decide the case and dispose of the property thus brought under its jurisdiction. A claim that the jurisdiction of the Court in which the creditor's bill is filed relates back to the commencement of the suit at law, and thereby ousts that of the other Court, would not deserve a moment's consideration. It seems to us, however, that just such a claim is here set up in behalf of the plaintiff. These illustrations show that it does not follow that because a proceeding is based upon a former judgment, or is intended to enforce it, or is brought in aid of it, it is not for all that a new suit.

We have already shown that the application for a mandamus is a new suit in relation to the parties, and we think it is now equally clear that it is a new suit in reference to its subject matter and to the relief sought, and is a new and distinct proceeding within the meaning of the rule which we have

laid down as governing Courts of concurrent jurisdiction. These views are well sustained by authorities of the Supreme Court of the United States. In the case of Kendall vs. Stokes, 12 Peters 614, the nature and power of the writ of mandamus are closely examined, and it is declared that it is, in modern practice, an action or suit brought by one party claiming a right against another who refuses him that right. In another suit between the same parties, reported in 3 Howard 100, the action was Case, for damage growing out of the same transaction for which the mandamus had been allowed. The Supreme Court in this latter suit held that the proceeding in mandamus was a suit between the parties, and that it was a bar to the action then before them; and this it did on the ground that the mandamus was a suit at law in which the rights of the parties had been adjudicated and could not be litigated again. In the case of Commonwealth of Kentucky vs. Dennison, 24 Howard 66, C. J. Taney, delivering the opinion of the Court, says: "It is equally well settled that a mandamus, in modern practice, is nothing more than an action between the parties, and is not now regarded as a prerogative writ."

The result of these views is that the application for a peremptory mandamus must be denied in both cases.

We have not felt called on to determine how far it would be the duty of this Court to consider the position in which the Supervisors would be placed if the injunction had been issued after this Court had obtained jurisdiction, as a reason for not ordering them to violate it. There are cases which seem to imply that even in such case no writ should be issued, Ex-parte Fleming, 4 Hill, N. Y. R. 581, is of this character.

Other cases, supporting the general principle that a Court will not, by a mandamus, order an officer to do that from which he has been restrained by an injunction, are 5 Gilman 243, People vs. Gilmer. 7 Ohio State, 278, Oh. & Ind. R. R. Co. vs. Wyandotte Co. 29 Barb. R. 94, People vs. Commissioners of Sewers.

Jur. 767 No 94

In the Supreme Court of the United States.

DECEMBER TERM, 1867.

SUPERVISORS OF HENRY COUNTY, IOWA,

ats.

J. EDGAR THOMPSON, *Relator, &c.*

For a statement of the case see brief of Rankin and McCrary.

I.

My first point for the defence is, that the courts of the United States have no jurisdiction over State officers to compel them to do any official act, except in cases where the power is conferred by the Constitution of the United States, or by an act of Congress consistent with the Constitution; and that no such power has been conferred in this case.

The 2d section of the 3d article of the Constitution gives to the courts of the United States jurisdiction in "controversies between *citizens* of different States"—not between citizens of one State and *officers as such* of another State. Here is no express grant of power to the judiciary of the United States over the officers of a State. Is such a grant of power implied?

There is in the 8th section of the 1st article of the Constitution a grant of power to Congress to make all laws which shall be necessary to carry into effect the powers granted by the Constitution, but there is no power given by the Constitution to the Courts to take and exercise such jurisdiction as may be necessary to carry into

effect the jurisdiction directly granted. The Legislature may give the Court such jurisdiction under the above-cited clause; but, without the legislative grant, the judiciary has it not. And Congress has not granted to the Courts the power here attempted to be exercised. It has in no case authorized the Courts of the United States to act *directly* upon State officers. They can act on those officers in certain specified cases, through the Sate judiciary, and in no other manner.

The 25th section of the Judiciary Act of 1789 points out the only mode in which the Constitution and laws of the United States have authorized the Courts of the United States to act upon the officers of States as such, and compel them to perform, or restrain them from performing, official duties. On the reversal of a judgment brought up under that section, this Court may command the State court to enter the proper judgment; and by writ of *procedendo*, compel it to execute the same, by means of such instruments as the laws of the State have placed in its power.

Again, this Court is specially authorized, by the 13th section of the Judiciary Act, to issue "writs of mandamus, in cases warranted by the principles and usages of law, *to any courts appointed or persons holding office under the authority of the United States*"—not to courts appointed or persons holding office under the authority of the several States. Thus the writ of *mandamus* is "*specially provided for* by statute;" and it is limited to issue only to courts of the United States and *persons holding office under the authority of the United States. Expressio unius, exclusio est alterius.*

Then the 14th section gives the Courts of the United States power to issue "writs of *scire facias, habeas corpus*, and all other writs *not specially provided for by statute*, which may be necessary for the exercise of their respective jurisdiction." The mandamus, however necessary it may be, having been *specially provided for by statute*, is limited by

the terms of the statute providing for it, and does not come within the grant of power in the 14th section. *Such* are the provisions of the Constitution and the law, to guard against disastrous conflicts of jurisdiction in the case of this writ, which was likely, if not so limited, to arise.

This question was discussed in the case of Knox County vs. Aspinwall and others, 24 How., 376; but, singularly enough, the provisions of the 13th section of the Act of 1789, *specially providing "by statute"* for the writ of *mandamus*, and limiting its use, is wholly overlooked by the counsel, and consequently by the Court. For though the Court ought to know and recognize *sua sponte* the common law and the authoritative course of judicial decision, it were unreasonable to presume their knowledge of isolated statutory provisions bearing on a case, unless pointed out by counsel. Lord Coke says, "No thorough lawyer will burden his mind with such knowledge, but seek it, when wanted, in the statute book." I have deemed it proper to call the attention of the Court to that provision and to the law as it will stand, that provision being considered as part of it.

There is a practical difficulty in compelling a State officer to execute what a Circuit Court of the United States may decide to be a State law; and this case, of all conceivable cases, were perhaps the most difficult. The Board of State officers must *assess* and *collect* a tax under the mandate of the United States Court. They can *assess*, but how are they to *collect*. The assessment is disputed, as without warrant of law; the seizure and sale of property is a trespass, not excused by the mandate of a court which has no authority to command. It would be irregular and cause much confusion if an express act of Congress authorized such interference, and such mixed authority; but as there is no act authorizing it, it would be simply illegal. The State or County officers cannot obey the mandate of the United States Court and

seize the property of a citizen without becoming trespassers.

II.

But admitting the power of the United States Courts as claimed to act directly on State officers in ordinary cases, this case, we submit, presents one point which forbids it, namely:

The State officers whom the United States Court is asked to *compel to act* are parties in a suit in the State Court, and are by that Court *forbidden to act.* That this is an independent cause is too clear to admit of argument or question. It is *here on error*, and the cause of which it is supposed to form a part remains at rest in the Court below.

The process of injunction in the State Court was sued out on the same day with the *mandamus*, but it was *first served.* The State Court, therefore, first got jurisdiction, and now has it to the exclusion of the United States Courts, so that the affirmative action of this Court, in issuing the mandate, would at once make the collision which the 13th and 14th sections of the Act of 1789 were carefully framed to avoid; and if this Court give a judgment in this case, which involves the issuing of the mandate, and the State officers obey it, they do so in contempt of the Court of the State, which *may*, and we presume will, attach and imprison them, and the United States Court is powerless to relieve. Those courts may, under the 14th section of the Act of 1789, issue writs of *habeas corpus;* but to avoid collision with State authorities, they also are limited, and the writ "shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed by authority of some court of the same, or are necessary to be brought into court to testify."

Now the Courts of the State have jurisdiction over these State and County officers in the execution of the

State laws. The United States Courts have no control over them except as given by statute. We look in vain for a statute giving such power, and this Court is asked to be a law unto itself, and under its enlarged discretion to command a board of State officers to do what the State Court, having lawful jurisdiction, has forbidden them to do. If this Court compel the County officers to levy, and attempt to collect the tax, and the property holders, supported by the decree of the State Court, resist the collection by force, it is difficult to see by what legal means the United States Courts can support or sustain the County officers in the contest. If they be arrested and lodged in jail for disobedience of the injunction of the State Court, or for trespass in unlawfully seizing the goods of tax-payers to make the money, the Courts of the United States are powerless to relieve, for the writ of habeas corpus cannot reach them.—(Judiciary Act of 1789, Sec. 14.)

This Court has power enough if the parties take the proper course to invoke it. If the State Courts violate the Constitution in any of its provisions, or disobey a law of the United States, a writ of error from this Court, under the Judiciary Act of 1789, will set all right through the proper instrumentality without involving conflict of jurisdiction.

For the rest we adopt the brief of Henry Strong, Esq., filed in No. 177, and that of Messrs. Rankin & McCrary, in 246.

T. EWING,
Attorney for Respondents.